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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JOHN FULLERTON
and KATE MCELROY FULLERTON

Appeal 2014-007053
Application 11/680,155
Technology Center 3600

Before ANTON W. FETTING, JOSEPH A. FISCHETTI, and CYNTHIA L. MURPHY, *Administrative Patent Judges.*

FETTING, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE[1]

John Fullerton and Kate McElroy Fullerton (Appellants) seek review under 35 U.S.C. § 134 of a final rejection of claims 1–8, the only claims pending in the application on appeal. We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b).

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[1] Our decision will make reference to the Appellants' Appeal Brief ("Br.," filed December 6, 2013) and the Examiner's Answer ("Ans.," mailed April 9, 2014), and Final Action ("Final Act.," mailed December 6, 2012).

The Appellants invented forms of delivery of care, specifically, to the organization and administration of care across multiple disciplines for streamlined assistance of residents along the continuum of geriatric care in an assisted living setting. Specification 1: 4–6.

An understanding of the invention can be derived from a reading of exemplary claim 1, which is reproduced below (bracketed matter and some paragraphing added).

> 1. A method of delivering care to residents of an assisted living facility, comprising:
>
> [1] providing a medical center at the assisted living facility for the medical treatment of residents;
>
> [2] staffing the medical center with medical center staff comprising
>
> one or more on-site physician medical director
>
> and
>
> one or more nurse practitioner and/or physician's assistant
>
> for the administration of medical care
>
> to residents diagnosed with illnesses comprising complex disease or injury, progressive dementia, and/or life-limiting illness requiring palliative or end-of-life care,
>
> wherein the physician medical director is certified as a medical doctor and as a medical director;
>
> and
>
> [3] integrating the medical center staff
>
> with an interdisciplinary team comprising one or more facility caregiver and third party caregiver
>
> for the administration of care not provided by the medical center staff,

> wherein integration of the medical center staff with the interdisciplinary team comprises providing communication access to the medical center staff twenty-four hours a day, seven days a week,
>
> and
>
> wherein communication access comprises communication via telephone, communication via computer, communication via pager, communication via voicemail, or communication via fax.

The Examiner relies upon the following prior art:

Suresh	US 2003/0158751 A1	Aug. 21, 2003
Lenhard	US 2003/0229512 A1	Dec. 11, 2003
Massenzio	US 2005/0131740 A1	June 16, 2005

Fairchild, et al., *Physician Leadership: Enhancing the Career Development of Academic Physician Administrators and Leaders*, Academic Medicine, vol. 79, no. 3, 214–218 (Mar. 2004) (hereinafter "Fairchild").

Claims 1–7 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Lenhard, Massenzio, and Fairchild.

Claim 8 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Lenhard, Massenzio, Fairchild, and Suresh.

ISSUES

The issues of obviousness turn primarily on whether it was predictable to staff long term care facilities with high caliber medically trained personnel. The issue of whether staffing a facility per se is an abstract idea is newly raised.

FACTS PERTINENT TO THE ISSUES

Facts Related to Claim Construction

01. The disclosure contains no lexicographic definition of "physician," "interdisciplinary," or "nurse practitioner."

Facts Related to the Prior Art

Lenhard

02. Lenhard is directed to operating a long term care (LTC) facility. Lenhard, para. 2.

03. Lenhard describes traditional LTC facilities as employing administrators and caregivers. Lenhard, para. 19.

04. Lenhard describes traditional LTC facilities as being designed based on a medical model. Under the medical model, a caregiver is trained to function similar to an assistant in a hospital, e.g. to take a resident's temperature and give a resident medicine. Lenhard, para. 20.

05. Lenhard describes how administrators must understand the needs of residents including the psychological needs of residents and the emotional issues affecting residents. Further, administrators must ensure that caregivers have sufficient knowledge of the needs of residents, sufficient intervention skills, and are trained to adjust to the changing level of services required by residents as they age. Still further, administrators must understand and manage culture to provide meaningful satisfaction to residents and caregivers. Lenhard, para. 22.

06. Lenhard describes an LTC facility as including any senior housing facility such as a nursing home, assisted living facility, independent living facility, board and care home, continuing care retirement community, adult day care facility, home health care facility, hospice facility, or hospital. Lenhard, para. 31.

07. Lenhard describes caregivers observing and interacting with residents using a handheld device to enter observations that are transmitted to the database. Lenhard, para. 33.

08. Lenhard describes a resident's weight needing to be monitored based on a physician's instructions, and the caregiver reporting as instructed. Lenhard, para. 40.

09. Lenhard describes providing a mechanism for entering observations. A computer may guide, direct, and monitor the nature and quality of caregiver's actions. A computer overcomes the management control difficulties by facilitating a continuous flow of personnel monitoring, management, and maintenance activities. A computer may be used to monitor caregiver's actions to ensure that caregiver is focusing on resident by determining whether caregiver is entering a predetermined volume of observations at a predetermined frequency. For example, administrator may instruct caregiver to enter twenty-four observations of a resident over an eight hour period at a rate of three observations every hour. Lenhard, para. 41.

Massenzio

10. Massenzio is directed to providing monitoring and communication services as a management tool for healthcare providers who are responsible for the well being of special-needs individuals. Massenzio, para. 3.

11. Massenzio describes a network as comprising a wireless Internet connection, pager network, cellular telephone network or the public switched telephone network. With the network, the server integrates the newly acquired protected health information into a patient care database such that the database provides information showing the current and historical conditions of the patient, a historical record of the care provided and the care plan approved by payer. Massenzio, para. 67.

Fairchild

12. Fairchild is directed to Physician Leadership. Fairchild, Title.

13. Fairchild describes strong physician leadership as an important element in successful health care systems. Fairchild, p. 214, para. 1.

14. Fairchild describes physicians as generally disfavoring administrative positions. Fairchild, p. 214, para. 2.

15. Fairchild describes a credential of Certified Medical Director for nursing homes. Fairchild, p. 216, para. 1.

ANALYSIS

Claims 1–7 rejected under 35 U.S.C. § 103(a) as unpatentable over Lenhard, Massenzio, and Fairchild

We adopt the Examiner's findings and analysis from Final Action 3–10 and Answer 2–10 and reach similar legal conclusions.

In particular, we agree that one of ordinary skill in the assisted care arts would necessarily have significant training in medical arts and would immediately envisage a licensed physician as a potential embodiment of Lenhard's genus of administrators who must ensure that caregivers have sufficient knowledge of the needs of residents, sufficient intervention skills, and are trained to adjust to the changing level of services required by residents as they age. Such administration frequently comes under the rubric of medical director.

Similarly, we agree that one of ordinary skill in the assisted care arts, would again necessarily having significant training in medical arts and would immediately envisage a nurse practitioner or physician's assistant as a potential embodiment of Lenhard's genus of caregivers trained to function similar to an assistant in a hospital. As the very needs of long term care often require the services of some hospital or other medical facility when residents are infirm, this requires some form of coordination between the caregivers in the facility and the hospital. Such hospitals have telephone and web or email access at all times.

Claim 1 recites a process of staffing rather that a process that staff would then perform. The claim is to the qualities such staff should possess rather than actions they should perform. Most of the arguments come down to

whether the references describe individuals with as high a caliber of quality as claimed. Thus, Appellants argue that it was not obvious to staff with high quality personnel. This of course conflates obviousness with practicality. As Fairchild makes clear, it is simply difficult to find, much less attract, physician administrators. In any personalized service such as long term care, it is generally known that the higher quality the staff, the higher quality the service. Thus, it was at least predictable to look for staff with the backgrounds recited in the claims. Whether they could be found and attracted is another matter, and indeed, the claims do not recite any manner for doing so. But being difficult to attract does not make them any less predictable to desire.

Claim 8 rejected under 35 U.S.C. § 103(a) as unpatentable over Lenhard, Massenzio, Fairchild, and Suresh

We adopt the Examiner's findings and analysis from Final Action 10–11 and Answer 11 and reach similar legal conclusions.

CONCLUSIONS OF LAW

The rejection of claims 1–7 under 35 U.S.C. § 103(a) as unpatentable over Lenhard, Massenzio, and Fairchild is proper.

The rejection of claim 8 under 35 U.S.C. § 103(a) as unpatentable over Lenhard, Massenzio, Fairchild, and Suresh is proper.

NEW GROUND OF REJECTION

The following new ground of rejection is entered pursuant to 37 C.F.R. § 41.50(b). Claims 1–8 are rejected under 35 U.S.C. § 101 as directed to non-statutory subject matter.

The Supreme Court

> set forth a framework for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts. First, [] determine whether the claims at issue are directed to one of those patent-ineligible concepts. [] If so, we then ask, "[w]hat else is there in the claims before us? [] To answer that question, [] consider the elements of each claim both individually and "as an ordered combination" to determine whether the additional elements "transform the nature of the claim" into a patent-eligible application. [The Court] described step two of this analysis as a search for an "'inventive concept'"—i.e., an element or combination of elements that is "sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself."

Alice Corp., Pty. Ltd. v. CLS Bank Int'l, 134 S. Ct. 2347, 2355 (2014) (citing *Mayo Collaborative Svcs v. Prometheus Labs, Inc.*, 132 S.Ct. 1289 (2012)).

To perform this test, we must first determine whether the claims at issue are directed to a patent-ineligible concept. While the Court in *Alice* made a direct finding as to what the claims were directed to, we find that this case's claims themselves and the Specification provide enough information to inform one as to what they are directed to.

The preamble to claim 1 recites that it is a method of delivering care. The three steps in claim 1 result in staffing an assisted living facility. The Specification at page 1, line 4, recites that the invention relates to methods of

delivery of care. Thus, all this evidence shows that claim 1 is directed to delivering care.

It follows from prior Supreme Court cases, and *Bilski* in particular, that the claims at issue here are directed to an abstract idea. Like the risk hedging in *Bilski*, the concept of delivering care is a fundamental health and social assistance practice long prevalent in our system of caregiving. The use of delivering care is also a building block of both ancient and modern medicine. Thus, delivering care, like hedging, is an "abstract idea" beyond the scope of § 101. *See Alice Corp. Pty. Ltd.*, 134 S. Ct. at 2356.

As in *Alice Corp. Pty. Ltd.*, we need not labor to delimit the precise contours of the "abstract ideas" category in this case. It is enough to recognize that there is no meaningful distinction in the level of abstraction between the concept of risk hedging in *Bilski* and the concept of delivering care at issue here. Both are squarely within the realm of "abstract ideas" as the Court has used that term. *See Alice Corp. Pty. Ltd.*, 134 S. Ct. at 2357.

The remaining claims merely describe the qualities of caregivers and generic advice such as having meetings and using codes in billing. We conclude that the claims at issue are directed to a patent-ineligible concept.

Taking the claim elements separately, the function performed by each step of the process is purely conventional. Providing medical facilities and staffing with medically and interdisciplinary trained personnel is commonplace in health fields.

Considered as an ordered combination, the components of Appellants' method add nothing that is not already present when the steps are considered separately. There is no specified sequence to the steps at all much less one that would impart some benefit. Each step is not so much an action as

advice on what experience staff should have. Viewed as a whole, Appellants' method claims simply recite the concept of staffing an assisted living facility. The method claims do not, for example, purport to improve the functioning of a machine. Nor do they effect an improvement in any other technology or technical field. Instead, the claims at issue amount to nothing significantly more than an instruction to apply the abstract idea of staffing. Under our precedents, that is not enough to transform an abstract idea into a patent-eligible invention. *See Alice Corp. Pty. Ltd.*, 134 S. Ct. at 2360.

DECISION

The rejection of claims 1–8 is affirmed.

The following new ground of rejection is entered pursuant to 37 C.F.R. § 41.50(b). Claims 1–8 are rejected under 35 U.S.C. § 101 as directed to non-statutory subject matter.

Our decision is not a final agency action.

This decision contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b). 37 C.F.R. § 41.50(b) provides "[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review." 37 C.F.R. § 41.50(b) also provides that the Appellants, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

> (1) *Reopen prosecution*. Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner. . . .
>
> (2) *Request rehearing*. Request that the proceeding be reheard under § 41.52 by the Board upon the same record. . . .

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2011).

AFFIRMED; 37 C.F.R. § 41.50(b)